No. 85-287 (3)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

COURT HOUSE PLAZA COMPANY,

Petitioner,

v.

CITY OF PALO ALTO, ET AL.,

Respondents

On Petition From The Court of Appeal
Of The State of California, Sixth Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents City of Palo Alto, et al. ("City") oppose the petition on the single ground that the decision below was rendered under California law of *res judicata*, an "independent state ground." Consequently, City reasons, no federal question whatsoever is presented to this Court.

City offers too narrow a view of this case. City has not only mischaracterized the record upon which the Court below found *res judicata*, but also obscured the federal questions that lie at the core of that record.

More significantly, City's reply brief does not cite at all this Court's most recent decision on the prerequisites for federal jurisdiction in a fifth-amendment "takings" case–namely, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, __U.S.__, 105 S.Ct. 3180 (1985) (*"Hamilton Bank"*).

Consistent with the dictates of *Hamilton Bank*, petitioner Court House Plaza Company ("CHP") has fully exhausted all of available California remedies for taking of its property, including all judicial remedies available in California since 1977. In exhausting those remedies, CHP has necessarily obtained final judgments below.

The final judgment in *CHP I* produced the holding of *res judicata* in this case. Far from posing as an obstacle to review in this Court, the holding by the court below represents a seal of compliance with the requirements of *Hamilton Bank*.

Accordingly, the federal questions presented by the petition for certiorari may be addressed by this Court, notwithstanding that the court below relied upon California decisional law in determining that *res judicata* applied. For it is not the California doctrine of *res judicata* that is challenged here. Rather it is the taking of CHP's property and the constitutional deficiencies of California's remedies for that taking under the fifth and fourteenth amendments to the federal Constitution. California law on *res judicata* is implicated only to the extent that it has enabled the California courts to evade their constitutional responsibilities.

I. THIS COURT'S DECISION IN *HAMILTON BANK* REQUIRES PRIOR EXHAUSTION OF ALL AVAILABLE STATE REMEDIES, INCLUDING JUDICIAL REMEDIES.

In *Hamilton Bank* this Court held that the landowner's claims under the fifth and fourteenth amendments were premature and not ripe for adjudication, because the landowner had failed to exhaust certain administrative and judicial remedies still available in the county and the state, respectively. Because here the City has finally denied CHP an extension of the development schedule and because CHP lacks any further administrative remedies with the City, a fact never disputed by the City, CHP will address only the question of judicial remedies.

The landowner in *Hamilton Bank* had failed to bring an inverse condemnation action under Tennessee law in an effort to obtain just compensation for the alleged taking of property. In light of that failure, this Court ruled that the taking claim was "not yet ripe" because the state's action in denying just compensation was not yet complete. __U.S.__, 105 S.Ct. 3108, 3120. The court reasoned; ". . . if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation clause until it has used the procedure and been denied just compensation." *Id.* This is true, this Court explained, "because the constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, . . ." *Id.*

CHP has exhausted the judicial remedies available in California. CHP was denied equitable relief in *CHP I*, a suit for mandamus. The inverse-condemnation remedy was not within the scope of the relief requested in *CHP I* and so was not fully adjudicated in CHP I. In fact, after 1976 the California courts effectively restricted the landowner to pursuing equitable remedies, and by 1979 the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), eliminated the inverse condemnation remedy altogether.

Because the discussion of inverse-condemnation in *CHP I* was *dictum* only, the disposition of the petition for certiorari there has no importance for the present petition. 454 U.S. 1074 (1981) (U.S. docket no. 81-404).

As City reiterates tediously, *CHP I* led to adverse judgments based upon *res judicata* in both *CHP II* and *CHP III*. But the inquiry by this Court should not end there.

The chief thrust of the petition is that this case is now ripe for adjudication by this Court by virtue of petitioner's having exhausted all state remedies and by virtue of the failure of California courts to offer any "reasonable, certain and adequate provision for obtaining compensation" for the taking of CHP's property. *Hamilton Bank*, ___U.S.___ 105 S.Ct. 3108, 3121.

Had CHP not pursued the course of litigation in the California courts which City describes at length, those federal questions would be presented to this Court prematurely. They are not.

II. THE DECISION BELOW WAS NOT BASED UPON ANY INDEPENDENT GROUND OF SUBSTANTIVE STATE LAW.

A. *The Independent State Ground Doctrine Does Not Apply Here.*

Relying upon *Murdock v. Memphis*, 20 Wall (87 U.S.) 429 (1875), City argues that this Court may not review the decision below because the latter was based upon an "independent state ground." But *Murdock* does not prevent review here.

First, in *Murdock* the decision below by the Supreme Court of Tennessee was based upon the substantive law of that State; specifically, the law on real-property conveyances, trusts, and interpretation of instruments. 87 U.S. 429, 444. That kind of independent state ground is far different from the doctrine of *res judicata*. The latter possesses procedural aspects that distinguish it from other substantive rules of law. *See, generally, Restatement (Second) of Judgments* (1980), ch.1, at p.6 ("Decisions in the modern law of res judicata have been, or at least should have been, necessarily shaped by the statutory

provisions of the system of civil procedure. This relationship was not always fully appreciated.").

Obviously CHP is not challenging California law on *res judicata*; that is, the "primary right" doctrine relied upon by the court below. But CHP is challenging the application of that doctrine by the court below in a manner that violates CHP's rights under the federal constitution.

B. *A Paramount Federal Interest Renders the Independent State Ground Doctrine Inapplicable.*

Murdock v. Memphis does not prevent this Court from reaching those federal questions. In the past this Court has not regarded *Murdock* as a barrier to review where "the only relevant substantive law is federal." *Fay v. Noia*, 372 U.S. 391, 431 (1963).

In *Fay*, this Court refused to apply the adequate state-ground rule to a petitioner who failed to exhaust his state remedy of appeal before seeking *habeas corpus*. In doing so, this Court limited *Murdock* in at least two important respects: First, where "the only relevant substantive law is federal," then federal jurisdiction may still exist for this reason: "State law appears only in the procedural framework for adjudicating the substantive federal question. The paramount interest is federal." *Id.*

Second, *Murdock* and the independent state ground rule will not apply where, as a practical matter, strict application would make impossible the vindication of federal rights: "While it (the Court) has deferred to state substantive grounds so long as they are not patently evasive of or discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they make burdensome the vindication of federal rights" (footnote omitted). 372 U.S. 391, 432. *See, also, American Railway Express Co. v. Levee*, 263 U.S. 19, 21 (1923) ("The law of the United States cannot be evaded by the forms of local practice.")

The reasoning of *Fay v. Noia* applies to this case. Surely the "paramount" interest in this case is petitioner's federal right to compensation under the fifth amendment and the constitutional inadequacy of judicial remedies provided by the California

courts. The principle of comity therefore does not require giving effect to the *res judicata* holding by the California Court of Appeal.

Indeed, whether to apply the independent state ground doctrine in this case presents, in itself, a federal question to this Court. Because there is no legitimate state interest served by California's enforcing *res judicata* to preclude an inverse-condemnation claim, this Court may consider the question of reaching the federal constitutional issues notwithstanding the state ground of *res judicata*. *Henry v. State of Mississippi*, 379 U.S. 443, 447-8 (1965); *see, also*, Wright, Miller, Cooper & Gressman, Federal Practice and Procedure: Jurisdiction Sections 4021, 4024, 4026, 4029 (1977).

C. *This Case Presents A Recognized Exception to the Doctrine of Res Judicata.*

The California Court of Appeal acknowledged in its opinion that CHP's cause of action for inverse condemnation would have had "questionable validity" if raised in *CHP I*. Petition for Certiorari, Appendix B-4. The phrase "questionable validity" is a judicious euphemism. 'Worthless' might have been more accurate and plain.

Thus it is misleading for City to argue that the discussion of California remedies by the Court of Appeal is "merely a historical preface" to a precise holding on *res judicata*. City's Brief in Opposition, p.8. In truth, the history is not preface but essence. What the Court of Appeal said about inverse-condemnation remedies in California is a testimonial to the federal issues presented here.

The doctrine of *res judicata* itself admits the exception for which CHP argues here. For example, section 28 of Restatement (Second) of Judgments, *supra*, summarizes several exceptions to the general rule of issue preclusion.

One such exception is based upon a change in applicable legal rules or upon the broad principle of avoiding unfairness. There is no preclusion if:

> The issue is one of law and (a) the two actions involve claims that are substantially unrelated or (b) a new deter-

> mination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the law; . . .

Restatement (Second) of Judgments sec. 28(2) (1980). Yet another exception addresses the difference in "the quality or extensiveness of the procedures followed in the two Courts . . ." *Id.* sec. 28(3). Here CHP argues that the mandamus proceeding in *CHP I* entailed only a restricted scope of review and no direct inquiry into fifth amendment rights.

One could say that these exceptions flow from considerations of fairness—equity, in short. If so, then CHP commends those considerations to this Court. But City chides CHP for reciting the inequity CHP has suffered. City's Brief in Opposition, pp. 13-4.

CHP is not ashamed to declare that the experienced meaning of constitutional wrong is personal misfortune. It has always been thus. It is so here.

As the petition for certiorari states, CHP acquired vested rights in Phase 2 of its project; yet the California courts have refused to recognize those rights or to hear on the merits CHP's claim for damages. This is the wrong requiring redress in this Court.

CONCLUSION

This Court is well aware that the question of inverse-condemnation remedies has concerned other litigants in land-use cases arising in California since 1979 at least. The present case affords this Court another opportunity to answer that question. For this and all the above reasons, the petition should be granted.

POSTSCRIPT

On October 22, 1985, just before service of this Reply Brief, CHP learned that this Court had accepted review in *MacDonald, Sommer & Frates, Appellant v. The County of Yolo and The City of Davis, Appellees*, U.S. Docket No. 84-2015. The Jurisdictional Statement in that appeal presented two federal questions similar, in essence, to two of the questions presented. The questions in *MacDonald* are:

> 2. When zoning regulations are found to effect a taking, whether the Fifth Amendment mandates that the property owner receive just compensation for the time during which his property interest was subject to the regulations, or whether he can only obtain injunctive relief against future application of the regulations.
>
> 3. Whether a state, by limiting an aggrieved property owner's remedy to a mandamus action, deprives the property owner of an adequate state remedy, thereby denying the property owner of due process and rights protected pursuant to 42 U.S.C. § 1983.

Jurisdictional Statement, No. 84-2015, at p.ii. Here the first question presented by CHP subsumes both of the above (excepting the reference to an action under 42 U.S.C. § 1983):

> 1. Should this Court now resolve the division among the state courts and federal courts as to whether the Fifth Amendment to the United States Constitution requires a monetary remedy for inverse condemnation through excessive land-use regulation?

CHP's second question addresses the continued viability of *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979)—the decision relied upon also by the Third District Court of Appeal of California in *MacDonald*. Jurisdictional Statement, Appendix A.

Accordingly, CHP submits that this Court should grant the petition for certiorari for the same reasons the Court accepted

review in *MacDonald*. Alternatively, CHP suggests that deposition of the petition be deferred until after the Court decides the appeal in *MacDonald*. The federal questions are, in the final analysis, common to both.

Respectfully submitted,

FLEHR, HOHBACH, TEST,
ALBRITTON & HERBERT

By /s/ Harold C. Hohbach
Harold C. Hohbach*

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SANTA CLARA)

Harold C. Hohbach, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioner in this cause; that on this 23rd day of October, 1935, he mailed three copies of Reply Brief In Support Of Petition For Writ Of Certiorari in the cause by depositing same in the United States mail, first-class postage prepaid to:

Diane M. Lee	Fred Caploe
City Attorney	Williams & Caploe
250 Hamilton Avenue	P.O. Box 698
Palo Alto, CA 94301	Benicia, CA 94510

and that he also mailed forty copies of Reply Brief In Support Of Petition For Writ Of Certiorari to the Clerk of this Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

/s/ Harold C. Hohbach
HAROLD C. HOHBACH

SUBSCRIBED AND SWORN to before me this 23rd day of October, 1985.

Witness my hand and official seal.

Lorraine G. Miller
Notary Public

My commission expires:
June 10, 1987